United States Court of Appeals

for the Second Circuit

INTERVENOR'S BRIEF

77-4132

To be argued by
JAMES S. FRANK

United States Court of Appeals
For the Second Circuit

LAY FACULTY ASSOCIATION, LOCAL 1261 AMERICAN FEDERATION OF TEACHERS, AFL-CIO,
Petitioner,

against

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

ST. ANN'S EPISCOPAL SCHOOL,
Intervenor.

ON PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF OF THE INTERVENOR

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UNITED STATES COURT OF APPEALS
FILED
DEC 19 1977
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

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On Petition for Review of an Order of the
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BRIEF OF THE INTERVENOR

St. Ann's Episcopal School, the Intervenor herein ("School"), by its attorneys Simpson Thacher & Bartlett, hereby advises the Court that pursuant to Rule 28(i) of the Federal Rules of Appellate Procedure, it joins in the brief by the Respondent National Labor Relations Board ("Board") except as hereinafter set forth.

Since the Intervenor appreciates this Court's desire to avoid repetitious briefs and arguments, the School will only direct the Court's attention to the following two points on which it urges that the Board's brief is not supported by the record.

THE RECORD DOES NOT CONTAIN SUBSTANTIAL EVIDENCE OF UNLAWFUL ANIMUS

1. While the Board is apparently now willing to accept Hoffmann's uncorroborated testimony that Cohen told a group of teachers more than a year before the event leading up to the complaint herein that Bosworth said that he, Cohen, should write something about Hoffmann which could be used in the future (Board's Brief at p. 3), both Cohen and Bosworth explicitly denied making such statements (E-280, E-294-295, E-298, E-238), and the Board did not make a finding contrary to their denials*. Rather, the Administrative Law Judge credited Arent's testimony that Cohen told the group that Bosworth said "Don't you know the labor law . . . leave them alone" and that he, Arent, did not remember hearing Cohen say what Hoffman attributed to Cohen. (A-18, E-174).

2. While the Board did not specifically comment on the Administrative Law Judge's inferring the existence of anti-union animus from the facts that (a) certain School

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* References to the Joint Appendix are designated "A-__" and References to the Exhibit to the Joint Appendix are designated "E-__".

officials lawfully opposed unionization and (b) the School had signed a non-admission settlement agreement regarding a prior 8(a)(1) charge (A-18, A-21; E-486), the School urges that these two facts standing alone cannot serve as a substantial basis for an inference of unlawful animus.*

For the foregoing reasons the School urges that the record contains no substantial evidence of unlawful animus.

Based on the above, the entire record and Board's brief, the School urges the Court to affirm the Board's decision dismissing the complaint since the decision is supported by substantial evidence and was a proper exercise of the Board's statutory authority. Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951).

Dated: New York, New York
November 21, 1977

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* Assumedly, since the Board found that the School had not violated the Act even given the Judge's inferring the existence of animus, it found it unnecessary to comment on the School's exception to the inference, especially since the inference stemmed from a time more than six months before the charge was filed.

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

MARIE MULHALL , being duly sworn, deposes and says:

I am over the age of eighteen (18) years and am not a party to this action.

On the 19th day of December , 1977, I served 2 copies of the annexed paper upon James R. Sander, Esq., Donald Congress, Esq., 260 Park Avenue South, New York, New York 10010; Dorothy L. Moore, Esq., National Labor Relations Board, 1717 Pennsylvania Avenue, Washington, D.C. 20006

by depositing ~~a~~ true/~~copy~~ copies of the same in a properly addressed postpaid wrapper in a regularly maintained official depository under the exclusive care and custody of the United States Post Office Department located in the City, County and State of New York.

Marie Mulhall

Sworn to before me this
19th day of December , 1977.

Kathryn L. Hill

KATHRYN L. HILL
NOTARY PUBLIC, STATE OF NEW YORK
No. 52-4649802
Qualified in Suffolk County
Certificate Filed in New York County
Commission Expires March 30, 1979